

# **EXHIBIT A**



**Surface Transportation Board**  
Washington, D.C. 20423-0001

Office of the General Counsel

202-245-0260  
FAX 202-245-0460

April 5, 2018

**RECEIVED**

**APR 10 2018**

**DLA PIPER LLP (US)**

The Honorable Robert S. Lasnik  
United States Courthouse  
700 Stewart Street, Suite 15128  
Seattle, Washington 98101 – 9906

Re: *Swinomish Indian Tribal Community v. BNSF Railway Company*,  
Docket No. 2:15-cv-00543 – RSL

Dear Judge Lasnik:

I am writing on behalf of the Surface Transportation Board to offer the following comments in light of the Court's order in the above-captioned proceeding filed June 8, 2017, as clarified by the Court's ruling filed March 15, 2018. The comments offered here are not meant to challenge this Court's authority to resolve preemption issues arising under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 ("ICCTA").

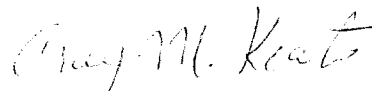
The Interstate Commerce Act gives the Board broad exclusive jurisdiction over transportation by rail carrier as part of the interstate rail system. 49 U.S.C. § 10501. The Court's June 8 Order addressed the relationship between the Treaty of Point Elliott and ICCTA's preemption provision and concluded that federal law claims based on the right of exclusive use granted by the Treaty could proceed. As this litigation moves forward, the Board would like to point out that judicial and agency precedent, including Ninth Circuit precedent, recognizes the need to harmonize ICCTA with other federal law to the extent possible. *See Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010); *Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517, 523 (6th Cir. 2001).

Honorable Robert S. Lasnik  
April 5, 2018  
Page 2

Consistent with that precedent, the Board's view has been that the "purposes and regulatory scheme under the Interstate Commerce Act" should be taken into consideration in cases such as this one that involve potentially conflicting statutory schemes. *United States Environmental Protection Agency – Petition for Declaratory Order*, FD No. 35803 (STB served Dec. 30, 2014), at 8; *CSX Transp., Inc. – Petition for Declaratory Order*, FD No. 34662 (STB served May 3, 2005), at 5-7.

The Board also notes that defendant BNSF Railway Company has asked the Court to certify for interlocutory review in the Ninth Circuit its recent summary judgment rulings on certain questions of law in the above-referenced matter. Prompt resolution at the appellate level of the important matter of harmonizing the Treaty of Point Elliott with the Interstate Commerce Act would be desirable for the parties; for rail shippers, other railroads, and local communities facing arguably analogous situations; and for the Board itself.

Respectfully submitted,



Craig M. Keats  
General Counsel  
(202 245-0264  
[Craig.Keats@stb.gov](mailto:Craig.Keats@stb.gov)

cc: All counsel of record